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No. _____

# In the Supreme Court of the United States

OCTOBER TERM, 1982

OREGON DEPARTMENT OF REVENUE,
Petitioner,

v.

PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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## QUESTIONS PRESENTED

1. Are federal savings and loan associations, chartered by the Federal Government under 12 U.S.C. § 1464, entitled to the protection of the Federal Government's immunity from taxation by the States?

2. Does the Tenth Amendment to the United States Constitution bar Congress from exercising its Commerce Clause power to prohibit the States from imposing nondiscriminatory and fairly apportioned taxes on corporations doing business within their borders?

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## OPINIONS BELOW

Petitioner, the Oregon Department of Revenue, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon, entered in this proceeding on May 19, 1982.

The opinion of the Oregon Tax Court which held that Congress' enactment of Public Law 93-100, 87 Stat. 347 (1973) was within Congress' authority to regulate interstate commerce (Appendix A) is reported, officially only, at 8 Or. Tax Rep. 466 (1980). The opinion of the Supreme Court of the State of Oregon, affirming the judgment of the Oregon Tax Court (Appendix B), is reported at 293 Or. 138, 645 P.2d 27 (1982).

## JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered on May 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 8, Clauses 3 and 18:

> "Congress shall have Power * * *
> "* * * * *
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
> "* * * * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

United States Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Public Law 93-100, 87 Stat. 347, Section 7(c):

"With respect to any taxable year or other taxable period beginning on or after the date of enactment of this section and before January 1, 1976, no State or policital subdivision thereof may impose any tax measured by income or receipts or any other 'doing business' tax on any insured depository not having its principal office within such State."

## STATEMENT OF THE CASE

Respondent is a federally chartered savings and loan association which has its principal office in Tacoma, Washington, and which maintains four branch offices within the State of Oregon.[1] In the tax year 1974, respondent was subject to the Oregon Corporation Income Tax Act of 1955, which imposed a tax upon corporate "net income derived from sources within [Oregon] other than income for which the corporation is subject to the tax imposed by the [Oregon corporation excise tax law] according to or measured

[1]The historic and procedural facts are not disputed and are taken from the opinions of the Oregon Tax Court and Oregon Supreme Court.

by its net income." Under this taxation system, the income attributable to sources within Oregon was determined under the Uniform Division of Income for Tax Purposes Act (codified at Or. Rev. Stat. § 314.605 *et seq.*).

Congress approved Public Law 93-100 on August 16, 1973, giving the Act an effective date of September 15, 1973. The Act prohibited any state or its political subdivisions from imposing any "doing business" tax or any tax measured by income or receipts on federally insured depositories which had their principal offices in another state. The federal Act initially barred state taxation until January 1, 1976; the bar was extended to September 12, 1976, by Public Law 94-222, 90 Stat. 197.

In its Oregon income tax return for tax year 1974, respondent stated, "In accordance with Public Law 93-100, the company has no taxable income in the State of Oregon." Petitioner Oregon Department of Revenue (Department) took the position that Public Law 93-100 exceeded the authority of Congress. It therefore assessed a tax deficiency against respondent, and issued an order to enforce the Oregon tax.

Respondent appealed the Department's order to the Oregon Tax Court. Respondent conceded that the Oregon tax was nondiscriminatory and relied primarily on the exemption conferred upon it by Public Law 93-100. The Tax Court suggested that federal savings and loan

associations are not constitutionally immune from state taxation as "federal instrumentalities," noting that it was "impressed by Justice Thurgood Marshall's dissent in *Agric. Nat. Bank v. Tax Commission,* 392 U.S. 339, 88 S. Ct. 2173, 20 L. Ed. 2d 1138 (1968), in which he wrote that the fact that institutions owe their existence to (are chartered by) the federal government must be rejected as a basis for tax immunity at the state and local level." *Pacific First Federal Savings and Loan Association v. Department of Revenue,* 8 Or. Tax Rep. 466, 471-72 & n. 2 (1980). The Tax Court held, however, that the congressional bar to income-based state taxation of federal thrift institutions was authorized by the Commerce Clause, and, due to its limited temporal and economic impact on the State of Oregon, did not breach limitations imposed by the Tenth Amendment. *Id.,* at 473-75.

On direct appeal to the Oregon Supreme Court the court did not address the question whether federally chartered thrift institutions enjoy governmental immunity from state taxation, although the issue was raised and briefed by the parties. Petitioner stated in its reply brief:

> "[A]s a matter of law and to the public seeking financial services, the distinction between federally and state chartered banks or savings and loan associations is lost." [App. Reply Br. at 2].
>
> "Plaintiff's reliance on the doctrine of immunity of federal instrumentalities is reliance on a

corpse without breath. If it is considered, it should be struck down." [App. Reply Br. at 5].

Examining the congressional bar to state taxation in light of this Court's recent discussions of the relationship between Congress' commerce powers and the sovereign perogatives reserved to the States by the Tenth Amendment,[2] the Oregon Supreme Court held that this Court's Tenth Amendment decisions had no bearing on Congress' power to regulate interstate commerce by immunizing certain commercial entities from state taxation. *Pacific First Federal Savings & Loan v. Department of Revenue,* 293 Or. 138, 144, 645 P.2d 27 (1982). The court concluded that *National League of Cities v. Usery,* 426 U.S. 833 (1976), and its progeny applied only to instances in which the Federal Government attempts "to regulate the managerial and operational aspects of state government." Quoting its prior decision in *Smith Kline & French v. Tax Commission,* 241 Or. 50, 61 n. 2, 403 P.2d 375 (1965), the Oregon Court held "that the congressional power over the taxation of the revenues of interstate commerce is supreme." 293 Or. at 145.

## REASONS FOR GRANTING THE WRIT

***Federal Savings And Loan Associations Are Merely Private Business Enterprises Which Have Not, In***

[2]United Transportation Union v. Long Island Rail Road Co., — U.S. —, 102 S. Ct. 1249 (1982); *Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264 (1981); *National League of Cities v. Usery,* 426 U.S. 833 (1976).

*Character Or Operation, Been So Assimilated Into The Structure Or Operations Of The Federal Government That They Should Partake Of The Government's Constitutional Immunity From Taxation By The States.*

The doctrine that instrumentalities of the Federal Government constitutionally are immune from state taxation was established in *McCulloch v. Maryland,* 4 Wheat. 316 (1819). In *McCulloch,* this Court struck down a Maryland tax upon the issuance of notes by the Second Bank of the United States. The Second National Bank, was truly a "national" bank. It issued currency, accepted as legal tender for all debts owed to the Government; it administered the Government's foreign exchange transactions; and the Secretary of the Treasury was required to deposit all federal funds in the Bank unless he could justify to Congress doing otherwise. *Agricultural National Bank v. Tax Commission,* 329 U.S. 339, 355 (Marshall, J. dissenting).

Despite the uniquely governmental character of the bank which was protected from state taxation in *McCulloch,* the doctrine of tax immunity of federal instrumentalities has been extended to protect federally chartered entities which bear only a tangential relationship to the integral operations of the Federal Government. *See Agricultural National Bank, supra,* at 354-55. Such immunity apparently has been invoked as a bulwark in upholding congressional acts limiting the exposure of banking institutions to local

taxation. *See Federal Land Bank v. Bismark Lumber Co.*, 314 U.S. 85, 102 (1941); *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 29-30 (1939).

As pointed out in Mr. Justice Marshall's dissent in *Agricultural National Bank*, modern banking institutions no longer perform significant fiscal services which are integral to the Federal Government. *Id.*, at 356-58. Today's federally chartered thrift institutions bear little resemblance to the Second National Bank considered by this Court in *McCulloch*. In fact, such modern institutions have far more in common with state-chartered corporations than with their federally chartered forebears. Like stockbrokers, bonding companies, law firms and building contractors, they operate to produce private profit by providing needed services. This Court has never modified its application of the *McCulloch* tax immunity to account for the gradual but dramatic changes in the role and the nature of the banking industry. It should take this occasion to do so. Because state taxation of these organizations would not fall upon an "instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities," *United States v. New Mexico*, — U.S. —, 102 S. Ct. 1373, 1382 (1982), constitutional immunity from state taxation should be denied.

Furthermore, a major impetus which induced the Court in *McCulloch v. Maryland* to immunize the

National Bank from state taxation was the fact that the Federal Government and its instrumentality had no political power in the state which would tax it, and therefore no means of checking oppressive local taxation. *Id.*, 4 Wheat. at 435. Federal thrift institutions are not saddled with this disability. No less than their taxable state counterparts, federal savings and loan associations exercise political force in the states where they conduct business. In fact, due to the facility with which state savings and loan associations may transfer to federal status, many federally chartered institutions are former state entities. *See Hopkins Savings Assn. v. Cleary*, 296 U.S. 314 (1935). Their stockholders remain part of the local polity. Therefore, so long as federal thrift institutions are free from state taxation which favors state over federal institutions, the two kinds of organizations have a commonality of interest against oppressive state taxation which results in sufficient political clout to warrant suspension of the federal immunity. *See United States v. County of Fresno*, 429 U.S. 452, 458-63 (1977).

Because federal savings and loan associations are not arms of the Federal Government, and possess sufficient local political power to counter the imposition of oppressive state exactions, their constitutional immunity from state taxation should be reexamined.

***By Directing The States To Suspend The Exercise Of Their Power To Tax Entities Doing Business Within***

***Their Borders, Congress Has Impermissibly Displaced The States' Traditional Powers To Establish A System Of Taxation Under Which All Who Benefit From State Government Pay The Costs Of Maintaining That Government And Its Services.***

Public Law 93-100 prohibited the States from imposing any tax measured by income upon a federally insured depository which did business in the taxing state, but which had its principal office in another state. If, as discussed above, such depositories are not covered by the Federal Government's immunity from state taxation, only the congressional Act would exempt the respondent from the taxes which Oregon seeks to impose. The States' general power to tax persons and businesses within their respective borders extends to interstate commercial activities so long as the tax is nondiscriminatory, is not unduly burdensome, and is fairly apportioned and fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977). The Oregon tax here at issue satisfies these criteria.

The exemption from state taxation which Congress purported to confer in Public Law 93-100 was not designed to effectuate the restrictions on state taxing authority contained in the Commerce Clause itself. Rather, it was intended to prohibit otherwise legitimate state taxes in order to benefit a specific element of commerce. The Tenth Amendment stands as a substantive bar to Congress' exercise of its otherwise

plenary power under the Commerce Clause. The Amendment embodies the dual sovereignty which underlies our federal system. Congress cannot divest the States of the fundamental aspects of their separate sovereignty through its power to regulate interstate commerce. *National League of Cities v. Usery, supra.*

Public Law 93-100 touches the very heart of a state's governmental power. By regulating and limiting the States' taxing authority, Congress fundamentally undermines the States' ability to constitute its government and to define its scope and reach. Just as surely as the power to tax is the power to destroy, the power to prohibit taxation is the power to abolish the government. Absent a compelling constitutional imperative, the Tenth Amendment should shield the States from such interference with their separate sovereign integrity. This Court's analysis of the Tenth Amendment compels such a conclusion.

In order to establish the invalidity of congressional commerce power legislation under the reasoning of *National League of Cities v. Usery, supra,* the challenged act must regulate the "States as States"; it must address matters which are attributes of state sovereignty; and state compliance with federal law must impair directly the States' ability "to structure integral operations in areas of traditional functions." *Hodel v. Virginia Surface Mining & Reclamation Assn., supra,* 101 S. Ct. at 2366. Public Law 93-100

expressly regulates the States "as States" — in their sovereign, governmental capacities. It provides that during the effective period of the Act "no State * * * may impose any tax measured by income * * *." Unquestionably, the power to tax those who enjoy the protections and services of state government is a traditional element of state sovereignty. *McCulloch v. Maryland, supra,* 4 Wheat. at 429. The determinative question, therefore, is whether the congressional bar to state taxation directly impairs the States' ability to structure integral operations in traditional functional areas.

Although the amount at issue in this case is only a few hundred thousand dollars, the decisive factor in determining whether Congress has impermissibly trenched upon state sovereignty is the character of the federal action, not its economic impact. *Hodel, supra,* 101 S. Ct. at 2368 n. 33. Public Law 93-100 clearly cuts more deeply into the muscle of fundamental state activity than the application of the Fair Labor Standards Act to state employees which was invalidated in *National League of Cities.* In *National League of Cities,* this Court held that the Tenth Amendment barred application of minimum wage laws to state employees because otherwise the States would have been required to restructure their pay scales and their established modes of delivering governmental services. *Id.,* 426 U.S. at 846-48. In this case, the congres-

sional bar to state taxation deprives the States of an anticipated source of revenue, and thereby economically requires the States either to readjust their integrated revenue systems to increase the burden on other taxpayers, or to sustain the loss. More importantly, however, it also effectively donates the services and protections offered by the state, which the state must necessarily afford to all, to a profit-making entity which is under no obligation to bear its fair share of the state's cost in providing these services. In effect, therefore, Congress has conscripted the free services of the state for the benefit of a commercial entity. Congress has affected the fundamental revenue generating perogative of the States in a manner which threatens their separate, independent existence in the federal system. *See National League of Cities, supra,* 426 U.S. at 851.

If outright congressional exemptions of businesses from state taxation, such as Public Law 93-100, are sustained, the economic survival of the States depends solely upon the whim of Congress. Given the breadth of commerce which Congress is authorized to regulate, *see Wickard v. Filburn,* 317 U.S. 111 (1942), virtually any industry, including those which dominate the economy of a given state, may be exempted from state and local exactions of any kind, thereby crippling that state's ability to secure the revenues which are necessary for it to act. If this function of the States is a

political question, solely committed to the halls of Congress, then the tension of dual sovereignty which structures the relationship between the Government and the States is a fiction, and the Tenth Amendment an empty promise.

## CONCLUSION

The decision of the Oregon Supreme Court permits Congress to destroy the independent existence of the States by suspending their sovereign powers to tax and by conscripting state services for the benefit of commercial entities. For the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Oregon.

Respectively submitted,
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